

Justice Michael D. Ryan (Ret.)
Chair, Attorney Regulation Advisory Committee
Arizona Supreme Court
1501 W. Washington Street
Suite 441
Phoenix, AZ 85007-3231

**IN THE SUPREME COURT
STATE OF ARIZONA**

In the matter of:)	
)	
PETITION TO AMEND RULES)	Supreme Court No. R-12-
32, 46-48, 50, 52-65, 70-72, and 74)	
Rules of the Supreme Court)	
_____)	

Pursuant to Rule 28, Rules of the Supreme Court, Justice Michael D. Ryan (Ret.), Chair of the Attorney Regulation Advisory Committee, respectfully petitions this Court to adopt amendments to Rules 32, 46-48, 50, 52-65, 70-72, and 74, Rules of the Supreme Court, governing attorney discipline as proposed in the attached Appendix A, showing changes in legislative format.

I. Background and Purpose of Proposed Amendments

On May 4, 2011, the Court established the Attorney Regulation Advisory Committee (ARC) to assist the Court in the attorney admissions and discipline system.¹ As one of its first tasks, ARC was directed to consider any technical or clarifying revisions to the new rules

¹ The members of the ARC are: Justice Michael D. Ryan (Ret.), Chair; Judge William J. O’Neil, Presiding Disciplinary Judge, Vice Chair; Attorney members: Alan Bayham; John Tuchi; James Drake; George Riemer; J. Scott Rhodes; Maret Vassella; Pamela Treadwell-Rubin; and Patricia Sallen; Public members: Benny Click; Dr. Ron Watson; and Emily Johnston.

governing lawyer discipline and, if appropriate, file a rule petition on or before January 10, 2012. A Rules subcommittee was formed to examine the rules and new discipline procedures. As a result of its examination and discussion, the subcommittee made recommendations for revisions to the full ARC. The ARC accepted the subcommittee's proposals; the proposed amendments are summarized below.

II. Contents of the Proposed Rule Amendments

In addition to editorial and technical changes, the proposed amendments include the deletion of all comments or notes to the rules that referenced the former discipline procedure. The amendments also include the following:

Rule 32. Organization of State Bar of Arizona

Rule 32(b) Definitions

The proposal removes the definition of "Commission" to conform to the new procedures.

Rule 32(c)(11)(B) Membership

The sanction of "censure" is changed to the sanction of "reprimand" to conform to the language of the new rules.

Rule 47 General Procedural Matters

Rule 47(h) Subpoena Power

The proposal adds language to allow a person or entity having an interest in the subject matter of the proceeding to object to a subpoena by filing a motion to quash.

Rule 50. Attorney Discipline Probable Cause Committee

Rule 50(c) Chair and Vice-Chair

The ARC recommends that the chair and vice-chair of the Attorney Discipline Probable Cause Committee have authority to rule on procedural motions that arise before the Committee.

The proposal also allows the vice chair to serve as chair in any matters in which the chair is unavailable.

Rule 50(e)(1) Powers and Duties of the Committee.

The current rule permits the Committee to meet in three member panels, provided that one member is a public member. Although the use of three member panels has not yet been used, the ARC determined that the Committee should retain this authority. To ensure a diverse composition of the panel, the proposal recommends that the panel include both a lawyer and a non-lawyer member. Also, each member must participate in the vote and a majority of the vote will decide the matter. As with the action of the full Committee, a member of the panel may participate by remote access, however, the quorum rules of subsection (f) do not apply to panels.

Rule 50(f) Meetings, Quorum and Voting.

The proposal requires that the quorum deciding a matter must include the participation of at least one attorney and one public member.

Rule 52 Hearing Panels

Rule 52(d) Vacancy

This new provision provides that if a vacancy occurs on a panel after a hearing has commenced, a new panel member must be given time to review the record of the proceedings before the hearing re-commences.

Rule 52(e) Alternate Hearing Panel Members

This new proposal provides a procedure for an extraordinary case (e.g., a hearing expected to last for several months) to allow the presiding disciplinary judge direct that additional panel members be assigned to sit as alternate hearing panel members. Before the commencement of the hearing, the disciplinary clerk would assign one volunteer attorney

member and one volunteer public member to sit as alternate panel members. In the event that a panel member is excused or removed during the hearing, the alternate panel member would replace that member on the panel. To ensure proper composition of the panel, the attorney alternate would replace an attorney member of the panel and the public alternate would replace the public member of the panel. The alternate attorney member would replace the presiding disciplinary judge if needed. The alternates could discuss the case with panel members but could not deliberate after conclusion of the hearing. Also, the alternates could not discuss the case with anyone until informed that a judgment and order had been issued in the case. If an alternate joined the panel during deliberations, the deliberations would begin anew.

Rule 53. Complainants

Rule 53(b)(3) *Duty to Advise Complainant of Proceedings*

The proposal provides that a complainant's written objection to an agreement for discipline by consent must be submitted to the state bar within five days of bar counsel's notice of the agreement. Bar counsel will submit the complainant's objection to the presiding disciplinary judge and serve a copy on respondent or respondent's counsel.

Rule 55. Initiation of Proceedings; Investigation

Rule 55(b)(2)(ii) *Review by Committee*

This amendment allows the Committee, in its review of a complainant's appeal of bar counsel's decision to dismiss the charge, to order bar counsel to conduct further investigation before deciding whether bar counsel abused his or her discretion in dismissing the charge. The current rule appears to require a finding of an abuse of discretion by bar counsel before requesting further investigation.

Rule 55(c)(1)(D) clarifies that the Committee will make a finding of probable cause and then order the appropriate sanction.

Rule 55(c)(4)(B) specifies that a respondent who demands a formal proceeding must do so by filing a demand with the Committee, together with a copy to bar counsel. The Committee will then vacate its earlier order and direct bar counsel to file a complaint.

Rule 56. Diversion

Rule 56(c) Diversion Agreement

The changes to the language in this provision clarify that, following an investigation under Rule 55(b), when diversion is recommended by bar counsel and, if the Committee agrees, diversion shall be ordered by the Committee. If diversion is offered and accepted by a respondent after a formal complaint is filed, the matter proceeds under Rule 57 as an agreement for discipline by consent.

Rule 58. Formal Proceedings

Rule 58(c) Initial Case Management Conference

Under the current rules, the initial case management conference was scheduled after the time for filing an answer had expired. Because an initial case management conference is unnecessary if an answer has not been filed, this provision provides that the initial case management conference will be set after the answer has been filed. Further, the conference will not be set if the parties have filed a notice of agreement for discipline by consent.

Rule 58(d) Default Procedure; Aggravation/Mitigation Hearing.

Under the current default procedure, the disciplinary clerk serves a copy of the notice of default on the respondent and default is entered eleven days after service of the notice if the respondent does not answer or otherwise defend. The proposed language changes this

procedure. Under the new provision, the disciplinary clerk enters the default and serves a copy of the notice of default on the respondent. The default becomes effective ten days from the entry of default, unless the respondent pleads or otherwise defends before the expiration of the ten days following the entry of default.

Rule 59. Review by the Court

Rule 59(c) Stay Pending Appeal.

The provision provides a time limit for a respondent requesting a stay of the decision pending an appeal: a request must be filed within ten days of the date the report was filed. The state bar may file a response to the request within five days of the respondent's request. Finally, the rule makes clear that no stay of the sanction will be granted if the only issue on appeal is the assessment of costs and expenses.

Rule 60. Disciplinary Sanction

Rule 60(b) Assessment of the Costs and Expenses.

The ARC extensively examined the issue of the assessment of costs and expenses in discipline proceedings. A Costs subcommittee was formed to examine the basis for imposing expenses in lawyer discipline matters and, in particular, the current administrative expense schedule used in lawyer discipline, disability and reinstatement cases. The subcommittee concluded that there was a rational basis for the current administrative expense schedule, but recommended that Rule 60(b) be amended to provide greater discretion to reduce, defer or waive the assessment of costs and expenses upon a showing of good cause. The subcommittee also recommended that Rule 60(b) be amended to include a comment setting forth guidelines for determining "good cause" for a reduction, deferral or waiver in a particular case. The subcommittee believed it was important to provide the information on the intended scope of

“good cause” and this would be best presented in a comment rather than in the body of the actual rule. The recommendations of the subcommittee were adopted by the full ARC and are presented in this petition.

The proposal provides that, in addition to waiver, the assessment of costs and expenses can be reduced or deferred upon a showing of good cause. The proposal reduces the time within which the State Bar must file its statement of costs and expenses to five days after the time for appeal has run. Under the current rule, the entity that adjudicated the discipline matter (the presiding disciplinary judge or hearing panel) would consider and rule on the assessment of costs and expenses. Under the proposal, the presiding disciplinary judge would rule on any objections and issue the appropriate order. Unless ordered by the presiding disciplinary judge, the objections would be considered on the pleadings without oral argument or an evidentiary hearing. Finally, if a respondent objects to the statement of costs and expenses following an appeal in this Court, the Court may remand the matter to the presiding disciplinary judge for adjudication of the issue.

The ARC proposes a comment to the rules to flesh out the factors to be considered as constituting “good cause.” The factors to consider may include evidence that a respondent offered in writing to consent, before a hearing on the merits, to the same or a greater sanction for the same rule violations that the respondent was found to have violated after a hearing; the disparity between the gravity of the charges filed and the violations found; and extreme financial hardship. The Comment provides that “extreme financial hardship” is not intended to cover the financial hardship of the proceeding.²

² The ARC was not unanimous in having the financial hardship of the proceeding excluded as a consideration in finding “good cause.” A minority believed that there may be circumstances in which a respondent would suffer extreme financial hardship as result of a sanction such as a

Rule 64. Reinstatement; Eligibility

Rule 64(e)(2) *Six Months or Less.*

A. Affidavit

The current rule required a lawyer who had been suspended for six months or less to file an “application” for reinstatement “on a form approved and provided by the court.” The requirement was unnecessary for the short-term suspensions. The proposal returns to the former language of the rule requiring only the filing of an “affidavit” in which the lawyer avows that he or she had complied with the requirements for reinstatement.

Rule 65. Reinstatement; Application and Proceedings

Rule 65(a)(1) *Application*

The current rule required a lawyer proceeding through formal reinstatement to file an application for reinstatement “on a form approved and provided by the court.” As with the applications for reinstatement for suspension of six months or less in Rule 64(e)(2)(A), the intent of this provision was to enable an online application process on a form approved by the Court. In reality, the concept of an online application for reinstatement proved unwieldy. The amendments return to the former process of the lawyer filing his or her own application for reinstatement.

Rule 65(a)(3)(A) *Application Fee*

The current rule provided that the lawyer would pay the reinstatement fee and the State Bar’s estimated costs of the proceedings to the Disciplinary Clerk. This process proved unworkable as the Disciplinary Clerk would be accepting money that later had to be remitted to

suspension. For example, a suspension could impact sole practitioners more disproportionately than other respondents.

the State Bar. The proposal returns the practice to the former process in which the lawyer paid all required fees to the records manager of the State Bar.

Rule 65(a)(3)(B) *Costs and Expenses of Disciplinary Proceedings*

This proposal make clear that a lawyer seeking reinstatement must pay all outstanding costs and expenses of the underlying discipline proceedings before filing an application for reinstatement and provide proof of payment with the application.

Rule 70. Public Access to Information

Rule 70(c) Authorized Disclosures

This proposal adds the disciplinary clerk and the Attorney Discipline Probable Cause Committee to the entities that may provide information concerning a pending discipline matter.

Rule 70(g) Sealing the Record/Protective Orders

The amendment permits an interested non-party or the presiding disciplinary judge to initiate the process of sealing portions of the record.

III. Conclusion

The proposed amendments to the discipline rules will clarify certain procedures and improve the process for all involved. The ARC requests that the Court adopt the rule amendments as set forth in Appendix A.

RESPECTFULLY SUBMITTED this 9th day of January, 2012.

/s/ Michael D. Ryan
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